SUPREME COURT

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MICHAEL RODAK,

No. 74-107

# IN THE SUPREME COURT OF THE UNITED STATES

YELLOWSTONE PINE COMPANY,
Petitioner,

vs.

THE UNITED STATES, et. al.,
Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT
OF THE UNITED STATES

YELLOWSTONE PINE COMPANY, ) No. .....
Petitioner, )
vs. )
THE UNITED STATES, et al., )
Respondent. )
)

## PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT
OF THE UNITED STATES
TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

YELLOWSTONE PINE COMPANY, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on November 15, 1974.

### I OPINIONS BELOW

The opinion of the United States Court of Claims is unreported and is printed in Appendix A, hereto, infra:

### II JURISDICTION

a) The order of the United States Court of Claims printed in Appendix A, hereto, was entered on November 15, 1974;

b) There has been no application for a rehearing in the United States Court of Claims nor has there been

any application for an extension of time within which to file a petition for a Writ of Certiorari;

c) The jurisdiction of the Court is envoked under Title 28, United States Code Section 1255 (1);

## III QUESTIONS PRESENTED

a) What right does a land owner have to gain ingress and egress from its land-locked property surrounded by the public domain which is administered by the United States Forest Service?

b) Does the refusal of the United States Forest Service to act upon a special use permit constitute a taking of a owner's land-locked property under the Fifth Amendment to the United States Constitution?

c) Where there is no appeal from a decision of the United States Forest Service denying a corporate owner access to its land-locked property, is such a denial a taking of private property which entitles the owner to damages under the Fifth Amendment to the United States Constitution on the theory inverse condemnation?

d) May the United States Forest Service deny a special use permit to an owner of land-locked property surrounded by public domain administered by the United States Forest Service on the grounds that to grant ingress and egress to the owner would be detrimental to adjacent Forest Service values.

e) Where the announced policy of the United States

Forest Service through an environmental Impact Statement is to create a wilderness area and to prevent logging of the private ownership land in an area of Public Domain where there exists a checker board land ownership pattern created by grants to a railroad company, should the United States Forest Service proceed under the Multiple Use Law (P.L. 86-517) or the Wilderness Act (P.L. 88-577)?

f) Where the announced policy of the United States Forest Service creates in fact, a Wilderness area in a checker board land pattern of ownership by denying the private owner ingress and egress to the owners land, is the owner entitled to compensation under the Wilderness Act (P.L. 88-577 Section 5).

g) Is a corporate owner of a land-locked property surrounded by public domain and administered by the United States Forest Service an "actual settler" under Title 16, United States Code, Section 478?

## IV. STATUTES INVOLVED:

The Statutes involved in this writ of Cetiorari are as follows:

a) Title 16 United States Code, Section 478:

Egress and ingress of actual settlers — Prospecting. — Nothing herein (Section 473, 478, 479-482, 551 of this title) shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations (national forests), or from crossing the same to and from their property or

homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations and may be prescribed by the Secretary of the Interior (Agriculture). Nor shall anything herein prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: Provided, that such persons comply with the rules and regulations covering such forest reservations (national forests). (June 4, 1897, c. 2, Section 1, 30 Stat. 36).

b) Title 16 United States Code, Section 531:

Definitions. — As used in this Act (Sections 528-531 of this title), the following terms shall have the following meanings:

(a) "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not

necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

(b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land. (June 12, 1960, P.L. 86-517, Section 4, 74 Stat. 215.)

Title 16 United States Code, Section 1134:

State and private lands within wilderness areas, — (a) Exchange of lands. — In any case where State owned or privately owned land is completely surrounded by national forest lands within areas designated by this Act (Section 1131 and note — 1136 of this title) as wilderness, such State or private owner shall be given such rights as may be necessary to assure adequate access to such State-owned or privately owned land by such State or private owner and their successors in interest, or the State owned land or privately owned land shall be exchanged for federally owned land in the same State of approximately equal value under authorities available to the Secretary of Agriculture: Provided, however, That the United States shall not transfer to a State or private owner any mineral interests unless the State or private owner relinquishse or causes to be relinquished to the United States the mineral interest in the surrounded land.

(b) Ingress and Egress. — In any case where valid mining claims or other valid occupancies

are wholly within a designated national forest wilderness area, the Secretary of Agriculture shall, by reasonable regulations consistent with the preservation of the area as wilderness, permit ingress and egress to such surrounded areas by means which have been or are being customarily enjoyed with respect to other such areas similarly situated.

(c) Acquisiting. — Subject to the appropriation of funds by Congress, the Secretary of Agriculture is authorized to acquire privately owned land within the perimeter of any area designated by that Act (Section 1131 and note — 1136 of this title) as wilderness if (1) the owner concurs in such acquisition or (2) the ecquisition is specifically authorized by Congress. (Sept. 3, 1964, P.L. 88-577 Section 5, 78 Stat. 896.)

## V. STATEMENT:

(a) Statement of case.

On April 30, 1965, the Northern Pacific Railway Company sold to the Plaintiff, Yellowstone Pine Company, all of the timber growing in the Porcupine-Buffalo drainage of the Gallatin National Forest located near the N.W. Corner of Yellowstone National Park, owned by the Northern Pacific Railway Company. The Northern Pacific Railway Company's ownership in the Porcupine-Buffalo Horn Drainage is in a checker board pattern which was caused by the United States granting alternate sections of land to the railroads as a subsidary for building the railroad.

Burlington-Northern, Inc., is the successor in

interest to the Northern Pacific Railway Company. The contract between Yellowstone Pine Company and the Burlington-Northern, Inc., will terminate on December 31, 1976.

The Plaintiff, Yellowstone Pine Company made application to the U.S. Forest Service for a special use permit in 1967 for an order to gain access to and harvest the Burlington-Northern timber. Congress appropriated part of the money to build the road access in order to harvest the timber. Two road routes were surveyed, and the Forest Service and the Burlington-Northern, Inc., were unable to agree between themselves as to which road was to be used. The money appropriated for the Porcupine-Buffalo Horn drainage was used by the Forest Service on another road project in the Gallatin National Forest.

The Forest Service refused to grant a special use permit to be, Yellowstone Pine Company, until its environmental impact statement was issued, one of the issues in tthe impact statement was to determine if Yellowstone Pine Co. should be granted the requested permit.

The delay by the U.S. Forest Service in issuing its environmental impact statement until May 1974, makes it impossible for Plaintiff, Yellowstone Pine Company to harvest the timber sold to it by the Burlington-Northern, Inc., in the Porcupine-Buffalo Drainage before the termination of the contract.

The Plaintiff started this action in the United States Court of Claims for money damages in 1974.

The United States Court of Claims entered its order dismissing the Plaintiff's complaint on November 15, 1974.

(b) Jurisdiction.

The Plaintiff, Yellowstone Pine Company, bases the original jurisdiction of the United States Court of Claims on the basis that the United States Forest Service action was an inverse eminent domain proceeding which took its private property without formal proceedings.

Yellowstone Pine Company also relies upon the premises that the United States Forest Service has created in fact, a wilderness area in the Porcupine-Buffalo Horn Drainage of the Gallatin National Forest, which entitles it to compensation under the Wilderness Act (P.L. 88-577 § 5).

Yellowstone Pine Company renewed its efforts to obtain access to the Porcupine-Buffalo Horn Drainage, but was delayed by the U.S. Forest Service. The delay was caused by the U.S. Forest Service making an Environmental Impact Statement on the Porcupine-Buffalo Horn Drainage. One of the objectives of the Environmental Impact Statement was to study the special use permit sought by Yellowstone Pine Company.

The draft of the Environmental Impact Statement was issued by the Forest Service on August 9, 1973, and the Final Draft was issued on May 13, 1974. The Final Draft provided that the Porcupine-Buffalo Horn Drainage of the Gallatin National Forest was to be maintained in a roadless state. The entire management prescription as a whole created a wilderness area since aerial logging cannot be carried on for a profit in the Gallatin National Forest. The Environmental Impact Statement in effect denied the Burlington-Northern, Inc., and the Plaintiff, Yellowstone Pine Company, of the use of the Burlington-Northern, Inc., property without just compensation.

## VI REASON FOR ALLOWING WRIT OF CERTIORARI

Yellowstone Pine Company believes that the United States Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by the United States Supreme Court.

The Western United States contains land of private corporations and persons which are co-mingled with the public domain in areas administered by the United States Forest Service. Owners of the land locked checkerboarded land surrounded by public domain have no recourse to any court in the event an application for a special use permit to cross forest service land to reach their own land is denied. The reason for this is that there is no appeal from a decision of the Forest Service denying a special use permit.

Land owners of land-locked parcels surrounded by the public domain are uncertain of what right of access they have to reach these lands in case the Forest Service decides that a permit should not be granted because it would be detrimental of Forest Service values. Loss of access results in the land becoming valueless.

With the exception of the case of *Perko, et. al., v. United States,* 108 F Supp. 315 (D Minn), aff'd 204 F 2d. 446 (8th Cir), cert. denied 346 U.S. 832 (1953), and the case of *Bydlon v. United States,* 175 F. Supp. 891 (Ct. Cl. 1959), no decision has been rendered by the Supreme Court of the United States as to the right of an owner of land surrounded by public domain to reach his land by a way of necessity or by statutory authority. It is necessary in an age becoming oriented toward the preservation of the environment that the Supreme Court of the United States considers this

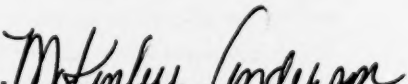
question for the benefit of the United States Forest Service on the one hand and the private ownership on the other hand. This especially is true in areas where both the timber manufacturers and the United States Forest Service need a decision to determine the right of access of an owner of private land surrounded by the public domain. The exact question that should be determined by this court is whether a grant of government land to an individual or to a corporation which is surrounded by public domain carries with it a right of way by reason of necessity. The Plaintiff, Yellowstone Pine Company, has not been able to find a case in the United States that deals directly with the question presented by this case. It would be for the best interest of the parties to this action, and for the nation if the Supreme Court of the United States would grant a Writ of Certiorari in this case and determine the issue presented.

## CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

ANDERSON & DASINGER

By 
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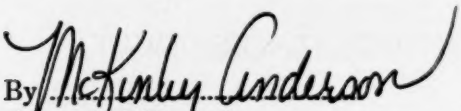
By 
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# Appendix A

IN THE UNITED STATES COURT
OF CLAIMS

No. 144-74

YELLOWSTONE PINE COMPANY
A CORPORATION

v.

THE UNITED STATES
[AND OTHERS, INDIVIDUALLY
AND AS OFFICIALS OF THE
UNITED STATES]

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Before SKELTON, *Judge,* Presiding,
NICHOLS and KUNZIG, *Judges.*

---

ORDER

This case comes before the court on defendant's motion, filed July 1, 1974, to dismiss the petition. Upon consideration thereof, together with the opposition thereto, without oral argument, it is concluded that the portion of plaintiff's claim which names as co-defendants officers of the United States, individually and in their official capacities, is beyond the jurisdiction of this court (see *United States* v. *Sherwood,* 312 U.S. 584 (1941) and that the remainder of plaintiff's case fails to state upon which relief can be granted (see *Mosca* v. *United States,* 189 Ct. Cl. 283, 417 F. 2d 1382 (1969), *cert. denied,* 399 U.S. 911 (1970); *Eastport Steamship Corp.* v. *United States,* 178 Ct. Cl. 599, 372 F. 2d 1002

(1967); and the United States Constitution amend. V.

IT IS THEREFORE ORDERED that defendant's said motion to dismiss plaintiff's petition is granted and the petition is dismissed.

BY THE COURT

BYRON SKELTON
Judge, Presiding

PROOF OF SERVICE

I, McKENLEY T. ANDERSON, JR., one of the Attorneys for Yellowstone Pine Company, hereby certify that on the 10 day of February, 1975, I served copies of the foregoing petition for Writ of Certiorari on the parties named hereunder pursuant to Rule 33:

TO: Solicitor General
Department of Justice
Washington, D.C. 20530

Gerold S. Fish
Attorney,
U.S. Department of Justice
Washington, D.C. 20530

McKenley Anderson

# In the Supreme Court of the United States

OCTOBER TERM, 1974

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No. 74-1071

YELLOWSTONE PINE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

---

Petitioner contends that the Court of Claims erred in dismissing its complaint for failure to state a claim upon which relief could be granted.

On April 30, 1965, the Northern Pacific Railway Company, predecessor in interest to Burlington-Northern, Inc., sold petitioner the right to extract timber from its property until December 31, 1976 (Ct. Cl. Pet. 1-2, 4).[1] The property is surrounded by the Gallatin National Forest, a wilderness area owned by the United

---

[1]"Ct. Cl. Pet." refers to the petition filed by petitioner before the Court of Claims containing petitioner's pleadings and allegations, which we are lodging with the Court.

States and administered by the United States Forest Service. Petitioner has requested the Forest Service to issue a Special Use Permit which would allow petitioner to construct a logging road across the National Forest (Ct. Cl. Pet. 2). While the Forest Service has not yet determined whether it will permit the construction of any logging road, it has so far rejected the particular routes and designs that petitioner has proposed (Ct. Cl. Pet. 8).

On April 2, 1974, petitioner commenced this suit in the Court of Claims, alleging that the failure of the Forest Service to act upon petitioner's request for a Special Use Permit comprised a taking of petitioner's property in violation of the Fifth Amendment, for which petitioner was entitled to $2,575,500 in damages (Ct. Cl. Pet. 8).[2]

The United States moved to dismiss the action on the ground that petitioner had failed to state a claim upon which relief could be granted. On November 15, 1974, the Court of Claims granted the motion and dismissed the complaint.

Petitioner's argument before the Court of Claims was premised upon an alleged right to construct a logging road through the National Forest. But this premise is supported by neither statutory authority nor judicial precedent. Congress has plenary power to govern the use of public land. *United States* v. *California*, 332 U.S. 19; *Utah Power & Light Company* v. *United States*, 243 U.S. 389. It has delegated its authority over the national

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[2]In addition to the United States, petitioner also named as defendants the Secretary of Agriculture and certain of his subordinates. In its response to the government's motion to dismiss, however, petitioner conceded that these individual defendants were not proper parties. The Court of Claims dismissed the petition as to these defendants, and petitioner does not now contest that portion of the order.

forests to the Secretary of Agriculture, 16 U.S.C. 551, who has discretion to deny or fail to act upon a request for a license to use national forest land for a private purpose, such as the construction of a logging road. Cf. *Texas Gulf, Inc.* v. *Federal Power Commission*, 494 F.2d 789 (C.A. 5); *Mosca* v. *United States*, 417 F.2d 1382 (Ct. Cl.), certiorari denied, 399 U.S. 911.

The statutes upon which petitioner relies for the first time in its petition before this Court[3] do not give it a right to construct a logging road through a national forest. Thus, 16 U.S.C. 478, which preserves the "egress or ingress of actual settlers residing within the boundaries of national forests," is inapplicable to petitioner, who is not a settler but a corporation seeking road access for the purpose of logging. Similarly, 16 U.S.C. 1134, which requires that the "owner" of private land surrounded by national forest "be given such rights as may be necessary to assure adequate access to such * * * privately owned land by such * * * owner," is also inapplicable to petitioner, which is a licensee rather than an owner.

In any event, petitioner has not been denied access to the timber land. As petitioner admitted in its petition before the Court of Claims, it may "log, either by aerial logging or horse logging" (Ct. Cl. Pet. 6) without the necessity of obtaining a Special Use Permit to construct

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[3]Since petitioner never raised these statutory contentions before the Court of Claims, this Court need not consider them. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147, n.2; *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16.

a logging road through the National Forest.[4] Although petitioner asserts that neither aerial nor horse logging is economically feasible, petitioner is not entitled to a method of access which will make it *profitable* to extract the timber. To assert such a right is tantamount to insisting upon the right to build a railway through the National Forest should the logging road prove an uneconomical means of extracting the timber, or the right to dig a canal should a railway prove unprofitable.

Finally, the Forest Service has not in fact denied petitioner's request to construct the proposed logging road. It has merely rejected the particular routes and designs that petitioner has proposed, finding that the plans would pose an unacceptable risk of damage to the surrounding wilderness land. Certainly the Forest Service may condition its permission to construct a logging road through the National Forest upon a showing that the road as planned would not jeopardize the National Forest through which it is built.

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

APRIL 1975.

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[4]Petitioner contends in its Petition for a Writ of Certiorari that the "announced policy of the United States Forest Service through an environmental Impact Statement is to * * * prevent logging of the private ownership land in * * * area[s] of Public Domain" (Pet. 2-3). The environmental impact statement to which petitioner refers, however, is merely a draft statement issued by the Forest Service on August 9, 1973, pursuant to the National Environmental Protection Act, 42 U.S.C. 4321-4335. Rather than announcing a policy against logging, the statement proposes that the "majority" of the land in the Gallatin Forest Area be preserved in a "roadless state," but that one road be reconstructed for use in "aerial logging" and that "short temporary roads" be permitted for the same purpose (Ct. Cl. Pet. 3).